IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-990

United States of America,

Petitioner,

v.

Clifford Bailey, et al.,

Respondents,

No. 78-5904

Clifford Bailey,

Petitioner,

v.

United States of America,

Respondent,

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

Brief in Opposition in No. 78-990 and in support of Cross-Petition for Certiorari in No. 78-5904

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Introduction

Respondent Clifford Bailey does not object to the jurisdiction of the Court. Although a more extensive statement of facts will be required if this case is accepted for review on the merits, respondent sets forth a brief statement of facts which are germane to the issues raised by the government in its petition and which supplement the government's statement of facts. There are, in addition, certain facts which pertain only to respondent's arguments set forth in his conditional cross-petition for certiorari in No. 78-5904. These facts, relating to the issue of custody, are set forth separately in Section II of this brief.

The decision of the court of appeals is now reported at 585 F.2d 1087.

Supplementary Statement of Relevant Facts

Respondent Bailey was convicted pursuant to 18 U.S.C. § 751(a) for escaping from the custody of the Attorney General. On the date of the alleged escape, August 26, 1976, respondent was being held in the New Detention Center of the District of Columbia jail, having been brought to the District of Columbia in June from the federal penitentiary in Leavenworth, Kansas, for the purpose of testifying in a criminal case on behalf of the defendant, Brad King.

Respondent acknowledged that he had left the District of Columbia jail without authorization. His defense at trial was that he had escaped because he feared that he might be killed by prison guards. T. 368-69. He testified that he had repeatedly been threatened and beaten by guards at the jail as punishment for testifying on behalf of Brad King. T. 468-69; 530-33; 538; 548; 587-590. The fact that Bailey's life had been threatened and that he had been beaten by guards was corroborated by Oliver Boling, a fellow inmate. T. 368-372.

Respondent was told that if he testified in the Brad King trial he would "never leave the jail alive." T. 469. Major Long told him that he'd leave him hanging "like the guy that was left hanging the Brad King case." T. 469. Bailey further testified that he had been harassed by guards and placed in "deadlock" as an example of what he would get if he testified in the King case. T. 473.

In an attempt to obtain redress for these threats and beatings, respondent Bailey filed a civil suit in Superior Court in early July against various guards. After filing the suit, he was subjected to further threats, harassment, and beatings by guards. T. 529-533. Bailey testified that, after he left the jail, he did not turn himself in because he thought he would be sent back to the D.C. jail and killed. T. 587-88.

Despite this testimony, the trial judge refused to instruct the jury as to the elements of the defense of duress. T. 769-70. Instead, the jury was instructed that any unauthorized departure from the prison would be sufficient to support the escape charge. T. 802. The court also instructed the jury that escape is a general intent offense which requires only "the purpose to do something, the will to do the act." T. 803.

Reasons for Denying the Writ in No. 78-990

I. The court of appeals' decision is not a departure from established principles.

The government begins its argument that a Writ of Certiorari should issue by stating that, "In its decision in this case, the court of appeals has departed radically from prior analysis of the crime of escape." Pet. 13. While the majority's detailed exposition of the law of escape provoked a lengthy dissent by Judge Wilkey, respondent believes that a careful examination of these opinions will justify the majority's observation that

"[t]he essential differences between the court and the dissent center around the proper roles of judge and jury ... and are hardly so far-reaching as the dissent's rhetoric suggests." 585 F.2d at 1092 n. 11. While the majority's insistence on abandoning labels such as "specific" and "general" intent and "duress" and "necessity" in favor of reasoned analysis may be seen by some as a radical change in the law, respondent suggests that the claimed conflicts in the circuits are more apparent than real.

A. The court of appeals' holding that to establish a violation of 18 U.S.C. § 751(a) the government must prove that the defendant had the intent to avoid confinement does not raise any issue that warrants review.

The most arresting feature about the government's first Question Presented is the manner in which the government has chosen to define the issue decided by the court of appeals. Seizing on language in a footnote[1/] by which the majority sought to respond to the dissent's interpretation of the words "intent to avoid confinement", the government frames the issue as whether § 751(a) prohibits escape "only from 'normal aspects of "confinement"' and does not prohibit an escape motivated by a prisoner's desire to avoid onerous jail conditions." Pet. 2. Respondent Bailey believes that this framing of the issue distorts what the court of appeals held and suggests that the ruling appealed from is much broader than it actually is.

Contrary to the impression created by the government, the court of appeals' ruling as to the elements which the government must prove to establish a violation of § 751(a) is but a narrow application of well-developed principles in the law of escape. Far from making a radical departure from precedent, the court adhered to the analysis adopted by the only other circuit to give

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1/ 585 F.2d at 1093 n. 17.

the issue thorough consideration.

In the leading case of United States v. Nix, 501 F.2d 516 (7th Cir. 1974), the court came to grips with a fundamental dilemma that results from applying labels like "specific" and "general" intent in defining the offense of escape. The dilemma is caused by the fact that the offense of attempted escape traditionally was regarded as a "specific" intent crime while escape itself required proof of a general intent only. Because of the conceptual and practical difficulties involved in differentiating between escapes and attempted escapes,[2/] the court rejected a mechanical application and turned instead to an analysis of what constitutes the "escape" element of the crime. United States v. Nix, supra, 501 F.2d at 518. The court concluded that escape is a voluntary departure from custody with an intent to avoid confinement, and that the "defendant under § 751 is entitled to an instruction that includes this mental component as an element of the crime which the government must prove." Id. 519. Since the court's instructions had withdrawn the mental element from the jury's consideration, the conviction was vacated.

In holding that respondent Bailey's conviction must be

2/ The court contrasted the situations of two defendants whose appeals had been argued the same day. In each case the defense was intoxication. Nix had been charged with escape while the other appellee, one Peterson, had been charged with attempted escape. The court of appeals said:

> The trouble with this approach is the impossibility of drawing a line between escape and attempted escape. Was the difference between Nix' act and Peterson's the eight miles Peterson traveled? Or an overnight absence versus the hours Nix was missing? Any escapee brought to trial was ultimately unsuccessful.
>
> > On reflection it will be seen that in cases arising under this statute [§ 751] the line of demarcation between an escape and an attempt to escape is often too shadowy to permit of the laying down of absolutes. [Footnote omitted.]
>
> United States v. Nix, supra, 501 F.2d at 518.

reversed, the court of appeals specifically relied on United States v. Nix as persuasive authority. Agreeing with the Seventh Circuit that adherence to formalistic labels had spawned a great deal of unnecessary confusion in the law of escape, the court followed the Nix analysis and held that an escape occurs when a defendant (1) leaves custody, (2) voluntarily, (3) without permission, and (4) with an intent to avoid confinement.

In this case, as in Nix, it was the failure of the trial court to instruct the jury properly that required reversal of respondent Bailey's conviction. Plainly, evidence of beatings in reprisal for testimony in a trial (such as that introduced by the respondent in this case), failure to provide essential medical care, or homosexual attacks would be relevant evidence concerning whether a particular defendant left a jail "voluntarily" and "with an intent to avoid confinement".

The government argues that neither the statute nor common law permitted such evidence to be used to demonstrate lack of intent to commit the crime of escape. However, this argument proves too much. We do not understand the government to quarrel with the basic premise that, if certain conditions are met, duress may be a sufficient defense to escape. But traditionally courts were reluctant, on grounds of public policy, to permit the defenses of duress and necessity to be relied upon by escapees at all. People v. Unger, 66 Ill.2d 333, 362 N.E.2d 319, 321 (1977). See also, United States v. Michelson, 559 F.2d 567, 569 & n.5 (9th Cir. 1977). Until People v. Lovercamp, 43 Cal. App.3d 823, 118 Cal. Rptr. 110 (1974), a case relied on by the government, "no reviewing court had ever upheld a defense of necessity in ordinary adverse situations such as threats from fellow inmates." 1975 U.Ill.L.F. 271, 275. The common law is not frozen like a fly in amber but is dynamic and responsive to the changing needs and concerns of society.

The government argues that the court of appeals' ruling in this case conflicts with decisions in other circuits. When the cases cited in the government's petition are scrutinized, the alleged conflict fails to materialize.

In United States v. Jones, 569 F.2d 499 (9th Cir. 1978), cert. denied, 98 S.Ct. 2243 (1978), the defendant had violated the terms of a weekend pass while participating in a pre-release program in a halfway house. He was prosecuted for escaping after he failed to return to his quarters at the appointed time. His defense was based on the theory that he did not have the intent to avoid confinement: the delay in his return was occasioned by the fact that he had journeyed to another city, committed a crime, and was apprehended by the police.

While the defendant was prosecuted under § 751(a), another statute, 18 U.S.C. § 4082(d), dealt specifically with wilful failures of persons in the defendant's situation to remain within the extended limits of confinement. The court of appeals made clear that its holding that the court's instructions were adequate was based upon § 751 and § 4082(d) when read together. 569 F.2d at 501. The court concluded that "[u]nder the circumstances of this case, the instructions given accurately explained to the jury the applicable legal standard" and, in a footnote, cited United States v. Nix, supra. 569 F.2d at 501 n.3. There is no conflict between United States v. Jones and the instant case.

In United States v. Woodring, 464 F.2d 1248 (10th Cir. 1972), the indictment had charged a wilful violation of § 751(a) and the court had instructed the jury that specific intent must be proven to convict. The court of appeals held that specific intent thus became the law of the case. While the court also said, without any citation of authority, that specific intent is not an element of § 751(a), that remark was purely dictum.

The government's reliance on United States v. Cluck, 542 F.2d 728 (8th Cir. 1976), cert. denied, 429 U.S. 986 (1976),

is similarly based on dictum. As in Woodring, the trial court instructed the jury that, in order to find the defendant guilty of escaping from a county hospital, it must find that he left "willfully and with the specific intent to avoid confinement therein." 542 F.2d at 736. Moreover, in the text of its opinion, the court of appeals specifically referred to United States v. Nix, supra, as defining the crime of escape as being a voluntary departure from custody with intent to avoid confinement. 3/

Chandler v. United States, 378 F.2d 906 (9th Cir. 1967), and United States v. McCray, 468 F.2d 446 (10th Cir. 1972), provide no support whatever for the government's claim of conflict. In

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3/ In a footnote, the court said:

> The statute does not in terms make intent an essential element of the offense. The departure from custody must, of course, be voluntary and conscious. See United States v. Snow, 157 U.S. App. D.C. 331, 484 F.2d 811 (1972).[sic] In any event, the case was tried on the theory that it was incumbent on the government to prove wilfulness and intent to escape, and that theory became the law of the case [citing Woodring].
> 542 F.2d at 731 n.2.

It appears that all the court meant to say by this was that read literally, the statute says nothing about intent. United States v. Snow, supra, cited by the court, supports respondent's position that more than a general intent is required. Snow had been convicted in a non-jury trial of escape from a halfway house. The record, although sparse, indicated that he had been accused of stealing clothing from a room in the house and there had been threats and fighting during the weekend of his escape. 484 F.2d 811 n.3. On appeal, Snow argued that the prosecution had failed to prove that he acted with a criminal intent -- "an essential element of the criminal charge." Id. 811. Snow's claim was based upon the fact that he was in danger of serious bodily harm and, therefore, his leaving was involuntary and not criminal. While the court seems to have treated Snow's claim as one of duress, it is equally as capable of being viewed -- as Snow put it -- as negating criminal intent. In fact, the court of appeals in the instant case stated that one of the traditional categories of duress -- duress by compulsion -- is indistinguishable from the defense of lack of intent. United States v. Bailey, 585 F.2d at 1097. See also, United States v. Spletzer, 535 F.2d 950, 954 & n.4 (5th Cir. 1976).

Chandler, the only issue regarding intent was the time of its formation; in McCray, there was no discussion of the intent element whatsoever. Although each court set forth a definition of the offense covered by § 751(a),[4] neither court defined the term "escape". The holding in Chandler that the intent to escape need not be contemporaneous with the initial leaving presents no conflict with anything the court of appeals held in this case.

United States v. Chapman, 455 F.2d 746 (5th Cir. 1972), addressed the same question raised in Chandler regarding the time the intention to escape was formulated. Even though the court did not address the degree of the intent required to sustain a conviction, it did observe that the defendant's "use of a false name and false identification cards when he was apprehended are indications of an intent not to return to federal custody." 455 F.2d at 750 (emphasis added). While arising in a different context, this approximates the standard applied by the court of appeals in the case sub judice.

Finally, it is significant that McCray, Chapman, Chandler, as well as Woodring, were all decided prior to United States v. Nix, which was the first case to give thorough consideration to the definition of escape in § 751(a).[5] Even if these cases

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4/ The two courts defined the offense in slightly different terms, depending upon the specific act in the statute which the defendant was accused of having committed. Chandler states that:

> [T]here must be proof of three facts: (a) that there was a conviction, (b) that there was an escape, and (c) that such escape was from a confinement arising by virtue of the conviction. 378 F.2d at 908.

McCray defined the offense as:

> The elements of the offense are (1) escape (2) from the custody of an institution where he is confined by direction of the Attorney General (3) pursuant to process issued under the laws of the United States by a court. 468 F.2d at 448.

5/ Of course, the Nix court's analysis did not produce a novel result. As the Seventh Circuit found, "[m]ost courts, confronted with evidence that a defendant could not or did not form an intent to leave and not to return, have held such an intent essential to proof of the crime of escape." 501 F.2d at 518.

could be said to conflict with Nix and United States v. Bailey, which we deny, the standard adopted in these latter cases could not have been considered and rejected by these courts.

B. The government's arguments for review of the court of appeals' holdings regarding the defense of duress either seek to raise issues not properly preserved below or fail to present convincing reasons why review should be granted.

The second question presented by the government seeks to obtain review of a number of distinct issues regarding the defense of duress. Several of these are not properly before the Court.

First, petitioner argues that the court of appeals has made a significant change in the law of duress by eliminating any requirement that the threatened harm was imminent at the time of the escape. Pet. 12. It is clear from the record, however, that the only reason the trial court refused to give the duress instruction requested by the respondents was because it was convinced that they had failed to voluntarily return to custody. Tr. 725, 777. With the exception of a footnote[6] in its brief in the court of appeals, the government did not advert to this issue and failed to mention it in its petition for rehearing en banc.

The only discussion of the point by the court of appeals is in a footnote replying to the dissent. 585 F.2d at 1099 n.39. Here the court pointed out that the trial court had evidently concluded that the evidence presented was sufficient to go to the jury but for the respondent's failure to meet the return requirement. The court also pointed out that an inflexible immediacy requirement would be inappropriate in the escape context because substantial danger and the opportunity for escape would rarely coincide. A fair reading of the court's opinion results in the conclusion that it believed the evidence was sufficient to meet

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6/ Brief of United States in the court of appeals, p. 28 n.29.

any reasonable standard of imminent harm and that it was unnecessary to enunciate standards to govern other cases.

Secondly, the government raises the question of whether a prisoner may invoke the duress defense when he fails to exhaust civil, administrative, or judicial remedies. This issue was neither presented to nor ruled upon by the courts below. As previously indicated, the trial judge was fully prepared to give the duress instruction except for the fact that the respondents had not returned to custody. The opinion of the court of appeals contains no discussion of the issue, which is not surprising in view of the fact that it was neither briefed nor argued.

In any event, respondent Bailey did file a lawsuit in the Superior Court of the District of Columbia to halt the threats and beatings designed to intimidate him from testifying in the Brad King case. T. 481; 585 F.2d at 1091 n.6. After the suit was filed, he was threatened with physical violence if he did not withdraw it and was forcibly put in the mental ward. T. 580-81. It is noteworthy that those who allegedly threatened the respondents included ranking officers, and not just guards, at the jail. T. 469, 472-73.

The government's third claim, the only one properly before the Court, is whether the fact that respondents failed to return to custody after the escape barred the defense of duress. Pet. 18-19. It was for this reason, and this reason alone, that the district judge refused to instruct the jury on the duress defense.

In analyzing the defense of duress, the court of appeals shunned labels for the same reason it had done so in its examination of the intent element of escape. The principle which the court deemed most applicable to the present case was that which excuses criminal conduct because the actor reasonably believes his conduct necessary to avoid a harm more serious than that which the statute defining the offense prohibits. 585 F.2d at 1098. While not disagreeing with the concept that the defense lasts only as long as the defendant is faced with a "choice of evils",

the court held that this was an inappropriate case for its application where the respondents were not charged with escape by failing to return:[7/]

> Although we would be very sympathetic to a jury instruction similar to that in Chapman to the effect that a defendant can "escape" by failing to return to custody even if his initial departure was justified and that a choice of evils defense to escape must therefore justify not only a defendant's original departure but also his continued absence, no such instruction was given in this case ... Thus, this is not a case where the jury was considering whether a defendant had escaped by failing to return. 585 F.2d at 1100. (footnotes omitted)

Thus the court's ruling is confined to the fact that the trial judge had prevented the defendants from having the jury pass upon the duress defense to the crime for which they were charged by deciding that the defense would be unavailable under a theory of liability that was neither charged nor given to the jury. Not only is this issue much narrower than the government would have the court believe, but also it serves to distinguish this case from others cited by the government as being in conflict. See, e.g., United States v. Michelson, supra; People v. Lovercamp, supra.

The government argues that the court of appeals went further and held that an escapee's continued refusal to report to the authorities is excusable under the theory of duress "if the conditions establishing the defense ... continue for the period a prisoner remains at large." Pet. 18. The court did pose the question

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7/ Respondent Bailey's indictment read:

> On or about August 26, 1976, within the District of Columbia, CLIFFORD BAILEY, having been lawfully committed to the custody of the Attorney General on March 6, 1973 and April 18, 1973, by virtue of a conviction and sentence imposed by the United States District Court for the District of Maryland in criminal case Numbers 72-0599 and 73-077, respectively, did unlawfully and wilfully flee and escape from such custody.

of "whether a jury should be allowed to consider an otherwise sufficiently supported choice of evils defense in the absence of one of the special prerequisites some courts have imposed upon such defenses in escape cases -- the requirement that an escapee turn himself in to the authorities immediately after escaping." 585 F.2d at 1098-99. (Footnote omitted). The court analyzed the relevant cases and appears to have concluded that the "choice of evils" defense lasts only as long as the choice of evils justifies a failure to return. 585 F.2d at 1100, 1101 n. 52.

Even assuming, as the government claims, that this finding breaks new ground, the court's judgment on the "choice of evils" defense plainly rests on the narrower ground discussed above. For the reasons stated, that holding does not merit review by this Court.

II. If the Court should issue a Writ of Certiorari to the court of appeals to review the issues presented by the government, then it should grant Petitioner* Bailey's cross-petition to review the court's disposition of the custody issue.

Questions Presented

1. Whether a federal prisoner, brought to the District of Columbia pursuant to a writ of habeas corpus ad testificandum issued by the Superior Court of the District of Columbia and confined in the D.C. Jail (which is not under the control of the Attorney General) may, following his escape from that institution, be convicted under an indictment charging "escape from the custody of the Attorney General" in violation of 18 U.S.C. § 751(a).

2. Is the determination of whether a prison inmate, in the circumstances described in Question No. 1, is in the "custody of

*/ Bailey is the petitioner in No. 78-5904.

the Attorney General" pursuant to the statute a question of fact for the jury or a matter of law to be decided by the court?

Statement of Relevant Facts

Petitioner Bailey was serving a sentence at the federal penitentiary in Leavenworth, Kansas, when, in June 1976, the Superior Court for the District of Columbia issued a Writ of Habeas Corpus Ad Testificandum requiring his presence as a witness in the case of United States v. Brad King. The Writ commanded the warden of the penitentiary and the United States marshals for Kansas and the District of Columbia to produce him,

> [s]o that he may be available to testify for a trial in this cause, presently set for June 14, 1976 and then, upon the conclusion of such proceedings, be returned by either of the aforementioned United States marshals, or a deputy thereof, to the custody from whence he came ...

Petitioner Bailey arrived in the District on or about June 1, 1976 and was incarcerated in the District of Columbia jail. The trial record does not disclose the date upon which he testified or when the Brad King trial came to a conclusion. But petitioner was still in the District of Columbia jail as of August 26, 1977 when he left without permission.

Petitioner was subsequently indicted under 18 U.S.C. § 751(a) for wilfully and unlawfully escaping from the custody of the Attorney General. While § 751(a) makes it an offense to escape from any "custody under or by virtue of any process issued under the laws of the United States by any court, judge or magistrate", he was not indicted for a violation of this provision. 8/

8/ Compare Bailey's indictment, set forth in footnote 7, supra, with the offense charged in Derengowski v. United States, 404 F.2d 778, 780 (8th Cir. 1968), cert. denied, 394 U.S. 1024 (1969). There, the defendant was convicted of attempted escape from confinement "in the custody of the United States of America under and by virtue of a Writ of Habeas Corpus." Derengowski conceded that the Writ of Habeas Corpus Ad Prosequendum issued by the District Court was a civil "process issued under the laws of the United States."

[continued on next page]

After the prosecution completed its case, petitioner's counsel moved for a judgment of acquittal based, inter alia, upon the fact that the government had failed to prove that he was in the custody of the Attorney General when he was brought back to the District of Columbia under a writ of habeas corpus. Tr. 132-33. This motion was denied.[9/]

In his charge to the jury, the court instructed it that persons convicted in the federal court or the superior court or in federal courts throughout the country are committed to the custody of the Attorney General and that they "are still under the custody today of the Attorney General regardless of how they happened to be brought into the District of Columbia jail." Tr. 801. This instruction effectively withdrew the issue of custody from the jury's consideration. Petitioner and his co-defendants were found guilty.

The court of appeals rejected petitioner's contention that, after he was transferred on a Writ of Habeas Corpus Ad Testificandum, he was no longer in the custody of the Attorney General but instead was in the custody of the Superior Court.[10/]

[continued from previous page]

Where a statute sets forth a number of acts which constitute an offense, in order to sustain a conviction the indictment must set forth the specific acts in the conjunctive. "To charge the offense in the disjunctive (as it appears in the strict language of the statute), that the accused did one thing 'or' the other, would make the indictment bad for uncertainty, ..." Joyce v. United States, 454 F.2d 971, 976 (D.C. Cir. 1971), cert. denied, 405 U.S. 969 (1972). Here, of course, the statute does set forth, in the disjunctive, various acts which constitute the offense of escape, but the indictment charged only escape from the "custody of the Attorney General".

9/ The court stated that it would take judicial notice that the District of Columbia correctional facility had been designated as an agent of the Attorney General for certain purposes. Tr. 132-33. However, as explained in the text, he gave a different explanation in his instruction to the jury.

10/ It is not clear from the court's opinion whether it based this judgment on the fact that Bailey was "confined in an institution designated by the Attorney General for the custody of federal prisoners", or because he remained in the Attorney General's custody "by virtue of" the original commitment. 585 F.2d at 1104.

Although the court of appeals regarded a portion of the trial judge's instructions to the jury on the point "confusing" and expressed concern that the instruction may have "invaded the province of the jury", it left the specific cure to be devised by the court on remand. 585 F.2d at 1101. It is not clear what role the jury is to play in resolving the custody issue, but it appears that it will be a limited one at best.

Petitioner claims, as he did before the court of appeals, that whether or not he was in the custody of the attorney general is a factual question to be resolved by the jury and that, because the government failed to establish a prima facie case at trial, he is entitled to a judgment of acquittal. Furthermore, to the extent that the court of appeals relied upon the fact that petitioner was held in a "designated" facility, it upheld custody on a ground not charged in the indictment. As the court itself pointed out in another context, but failed to apply here, the petitioner was denied the opportunity to have the jury consider the issue of custody because the court found the requirement satisfied by a theory not charged in the indictment. 585 F.2d at 1100-1101.

A. The custody issue is a fit subject for review on a Writ of Certiorari because the court of appeals' ruling conflicts with decisions of this Court and the courts of appeal and presents an important question involving the interpretation of § 75I(a).

In Barth v. Clise, 79 U.S. (12 Wall.) 400 (1870), the court held:

> By the common law, upon the return of a writ of habeas corpus and the production of the body of the party suing it out, the authority under which the original commitment took place is superseded. After that time, and until the case is finally disposed of, the safekeeping of the prisoner is entirely under the control and direction of the court to which the return is made. The prisoner is detained, not under the original commitment,

> but under the authority of the writ of habeas corpus. Pending the hearing he may be bailed de die in diem, or be remanded to the jail whence he came, or be committed to any other suitable place of confinement under the control of the court ...
> 79 U.S. at 407. See also, Stallings v. Splain, 253 U.S. 340, 343 (1919).

The court of appeals sought to distinguish Barth v. Clise on its facts, but the distinctions it drew based on policy grounds and "intuitive sense" are unconvincing. 585 F.2d at 1104. In the final analysis, the policies identified by the court are (1) to protect the interest of the sending jurisdiction in preventing the prisoner's escape and (2) claimed differences between the "Great Writ" and writs of habeas corpus ad testificandum.

In Johnston v. Marsh, 227 F.2d 528 (3rd Cir. 1955), a case cited by the respondents in their reply brief but not by the court of appeals, one Ackerman had been convicted of offenses in the state courts of Pennsylvania and was serving his sentence. He sought a writ of habeas corpus in the United States District Court for the western district of Pennsylvania challenging his state court conviction on due process grounds. His petition included a request that he be admitted to bail pending a decision on the merits because he was going blind. The court issued a writ of habeas corpus under 28 U.S.C. § 2241(c)(5).[11/] After a hearing, the court granted his request conditional upon his remaining in a private hospital. The warden of the state prison brought a petition for a writ of mandamus and prohibition asserting that the judge had exceeded his authority and sought to regain custody of Ackerman.

In refusing to issue the extraordinary writ requested, the court of appeals held that the basis for the judge's authority

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11/ " § 2241(c) The writ of habeas corpus shall not extend to a prisoner unless --

> (5) It is necessary to bring him into court to testify or for trial."

was the fact that Ackerman had been brought before him, and that the federal court had personal and subject matter jurisdiction. In a footnote, the court specifically addressed the issue of custody:

> We are not required here to decide whether a court can properly grant bail without first securing custody of the prisoner. On August 12, 1955, Judge Marsh issued a writ of habeas corpus ordering the prisoner brought before him and the prisoner was so brought. The Code, 62 Stat. 965 (1948), as amended, 28 U.S.C. § 2241(c)(5)(1952), gives the court the authority to issue writs "necessary to bring [the prisoner] into court to testify ...," without limitation as to the context of the testimony. When the prisoner came before the court, the Judge, under common law doctrine, gained custody of him, the authority of the writ superseding that of the original commitment. In re Kaine, 1852,14 How. 103, 133, 55 U.S. 103, 133, 14 L.Ed. 345 (dissent); Barth v. Clise, 1870, 12 Wall. 400, 402, 79 U.S. 400, 402, 20 L.Ed. 393.
> Johnston v. Marsh, 227 F.2d at 530 n.4.

This analysis admits of no distinctions between writs of habeas corpus ad subjiciendum and ad testificandum and refutes the notion that the interest of the sending jurisdiction that its prisoner not escape is determinative on the question of custody. This decision and the decision of the court of appeals in the instant case are irreconcilable.[12/]

B. The court of appeals' ruling that the petitioner was not entitled to a judgment of acquittal because the government failed to establish a prima facie case cannot be squared with other decisions of the federal courts.

The court of appeals indicated that the jury has some role to play in determining where custody lies without defining that role. Because the issue of custody is a factual question for the

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12/ While Johnston v. Marsh is not an escape case, obviously, the possibility that Ackerman could escape was present. There is no analytically sound basis for applying a different definition in escape and non-escape cases.

jury, and because the government failed to establish a prima facie case in the trial below, petitioner is entitled to a judgment of acquittal. The leading case, erroneously applied by the court of appeals, is United States v. Stead, 528 F.2d 257 (8th Cir. 1975), cert. denied, 425 U.S. 953 (1976).

While serving a sentence in a federal penitentiary in Marion, Illinois, Stead filed a petition for a writ of error coram nobis in the Missouri state courts attacking state court judgments and sentences already served. The state court issued a writ of habeas corpus ad testificandum to the federal marshal and the warden directing them to produce Stead on August 30. The writ stated that "after said proceeding the defendant shall be returned forthwith" to the custody of the marshal and warden. Stead was delivered to the St. Louis County jail and booked as a Federal Prisoner Awaiting Transportation" on August 28, 1974. On August 30, he was taken to the state court by a deputy federal marshal. When the proceedings ended, he was taken back to the jail by the same deputy to await transportation back to Marion. On September 21, 1974, he escaped from the county jail. After he was apprehended, he was charged with escape pursuant to § 751(a).[13/]

Stead claimed that he was in the custody of the Missouri state officials at the time of his escape. In holding Barth v. Clise, supra, inapposite, the court of appeals stressed that (1) the writ specifically provided that after his testimony he would be returned "forthwith" to federal custody; (2) his testimony in the habeas proceeding had been completed prior to his escape; and (3) he was being held in the federal prisoner section of the county jail when he escaped. The court could not say, in the face of this evidence, that the trier of fact made his decision "on evidence that supported his determination less than beyond a reasonable doubt." 528 F.2d at 258-59. The court further noted that the fact that Stead was booked on the jail records as

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13/ While the decision does not expressly say so, it seems clear enough that he was tried without a jury.

a "Federal Prisoner Awaiting Transportation" was conclusive evidence that his appearance in the case was completed and he was waiting to be returned to the federal prison.

Not only does Stead make clear that the issue of custody is a question for the trier of fact, but also it shows that the government here failed to establish a prima facie case. No evidence was introduced that petitioner had completed his testimony in the Brad King case; there was no evidence that he was in a "Federal Prisoner Awaiting Transportation" section of the jail from which such an inference could be drawn; the writ of habeas corpus expressly stated that at the conclusion of the proceedings he would be "returned to the custody from whence he came" (emphasis supplied). This is an explicit acknowledgment that there had been a transfer of custody once Bailey had come under the jurisdiction of the Superior Court of the District of Columbia.

The court of appeals also cites United States v. Viger, 530 F.2d 846 (9th Cir. 1976), and Tucker v. United States, 251 F.2d 794 (9th Cir. 1958) as reaching the same conclusion as in this case. In Viger, the court recognized that Barth v. Clise created a barrier to a finding of federal custody and based his ruling on the fact that the grand jury proceedings to which Viger had been called had been completed at the time of his escape. 530 F.2d at 847. In Tucker, the court adopted the government's position but only after a careful review of the evidence presented by the government that the defendant was, in fact, in federal custody when he escaped. 251 F.2d at 795.

Conclusion

For the reasons stated above, the government's petition raises no issues which merit review by this Court. If, however, the Court grants the government's petition, then it should review

the court of appeals ruling on the custody issue as well.

Respectfully submitted,

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